Public Prosecutor v Hanif Basree bin Abdul Rahman

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W–06A–8 OF 2004
MOKHTAR SIDIN, MOHD GHAZALI AND TENGKU BAHARUDIN SHAH JJCA
6 DECEMBER 2006

Criminal Law — Murder — Whether death caused by accused — Deceased died after sexual intercourse — DNA profile of an unknown male and accused found on items recovered from deceased body — Whether proved that accused was last person to have sexual intercourse with deceased

Criminal Procedure — Judgment — Grounds of judgment — Supplementary judgment — Certain findings delivered in oral decision omitted from written judgment — Whether appellate court ought to direct trial judge to provide supplementary judgment — Test to be applied — Courts of Judicature Act 1964 s 60(1)

Criminal Procedure — Prosecution — Prima facie case — Whether trial judge applied too heavy a burden on prosecution at close of prosecution case — Whether trial judge applied right test

Evidence — Witness — Inconsistencies in testimony — Whether trial judge's rejection of inconsistent testimonies was correct — Whether safe for court to act upon evidence which was doubtful and suspicious

The respondent was charged in the High Court, Kuala Lumpur with the offence of murder. He was alleged to have murdered one Noritta bte Samsuddin on 5 December 2003 between 1.30am to 4am in an apartment at Sri Hartamas ('apartment'). The deceased's body was found faced downwards on the mattress on the floor of her bedroom. Her head was covered with a pillow case and both her hands and legs were tied. Her mouth was stuffed with two pieces of face towels. The body was found by SP12 and SP28 who had earlier noticed a strong unpleasant body odour at the main entrance of the apartment. One of the two pieces of face towel that fell out of the deceased's mouth contained DNA belonging to an unknown male person as a minor contributor ('unknown male'). The respondent's DNA was also found on the towel and other items removed from the deceased room. The trial judge found that although it was ascertained that the deceased had sexual intercourse within 72 hours of her death, the evidence could not ascertain with absolute certainty that the respondent was the last person to have sexual intercourse with her. At the close of the prosecution's case, the trial judge found that the prosecution had failed to establish a prima facie case and the respondent was henceforth acquitted and discharged.

Against that decision, the Public Prosecutor appealed. Before this court, the main thrust of the learned DPP were, inter alia: (1) that the learned trial judge applied too heavy a burden on the prosecution at the close of the case for the prosecution in that he adopted the 'beyond reasonable doubt test' which ought to be applied only at the end of the whole case upon evaluating the case for the respondent as well; and (2) the learned trial judge's rejection of the testimonies of SP10 and SP11 in view of the inconsistencies and contradictions in their evidence was wrong as the learned trial judge could not reject their evidence in toto without considering the scientific evidence and other circumstantial evidence together and that he ought not to have rejected their evidence and what he should have done was at least to treat them with suspicion.

In relation to scientific evidence adduced at the trial, the learned DPP contended that the learned trial judge did not give adequate consideration to the following: (1) that the cause of death was asphyxia and it was caused by the two crumpled towels (exhs P16A and P16B) being forced into the deceased's mouth and that exh P16A bore the DNA profiles of the respondent and the deceased; (2) the tissue papers were wet when they were recovered from the waste paper basket in the deceased's bedroom and seminal stains from the tissue papers bore the DNA profile of the respondent which in turn would denote that he was recently engaged in sexual intercourse with the deceased; (3) bruises detected on both thighs of the deceased were caused by hard and heavy pressure by another person who was big in size pressing against the deceased; in relation to this he pointed out that the respondent's built could by inference denote that he could have caused those bruises; and (4) the deceased died after sexual intercourse had taken place and the evidence indicated that the respondent was the last person to have sex with the deceased and hence was responsible for the death of the deceased.

The prosecution also applied to move this court to exercise its powers under s 60(1) of the Courts of Judicature Act 1964 ('the CJA') to direct/order the learned trial judge to write a supplementary judgment in respect of certain parts of his oral decision delivered in open court on 1 July 2004 but omitted from his written grounds of decision dated 12 August 2004. The learned DPP argued that what were omitted were erroneous findings and its omission would deprive him from challenging the same. The findings said to have been omitted were: (1) that it was not surprising that the DNA profile of the respondent was found on exh P16A, ie the piece of face towel which was forced into the deceased's mouth as that piece of face towel had been used by the respondent who was a regular visitor to the deceased's room; and (2) it had been said that the respondent was together with the deceased a day before the incident but no experiment was carried out on the tissue paper found in the deceased's bedroom which were subsequently found to contain the respondent's wet seminal stains as to whether it would continue to remain wet even after 25 hours.

Held, dismissing the appeal and application by the appelant:

(1) The trial judge did not apply 'too heavy a burden on the prosecution at the end of the prosecution's case in that he adopted the beyond reasonable doubt test' as contended by the learned DPP. The learned trial judge had religiously followed what this court had in case *Looi Kow Chai* considered would be the

correct test that is to be applied in determining whether a prima facie case has been made out under s 180 of the Criminal Procedure Code (CPC), ie a judge sitting alone under s 180 of the CPC must subject the prosecution evidence to maximum evaluation at the close of the prosecution case and ask himself the question, viz if he decides to call upon the accused to enter his defence and he elects to remain silent, is he prepared to convict him on the totality of the evidence contained in the case for the prosecution (see para 39).

(2) There were cogent reasons for the learned trial judge to reject the evidence of SP10 and SP11 and that it was unsafe for the court under such circumstances to act upon evidence which was doubtful and suspicious and as such, this court could not come to a clear conclusion that the learned trial judge was plainly wrong. The learned DPP had failed to satisfy this court that the learned trial judge was plainly wrong and that his decision should have been the other way. Even if the learned trial judge had accepted the evidence of SP10 and SP11 and held that the respondent was the last person to be seen with the deceased, that would not have led to the irresistible inference that it was the respondent who murdered the deceased (see para 47).

(3) What is clear from the scientific evidence introduced at the trial is that there was the presence of the DNA profile of the unknown male. Thus, the learned trial judge was correct in concluding that the prosecution had not proven that the respondent was the last person to have had sexual intercourse with the deceased (see paras 52 & 58).

(4) The circumstantial evidence did not point conclusively that the death of the deceased had been caused by or in consequence of the act of the respondent and that such act was done with the intention of either causing death or of causing bodily injury sufficient in the ordinary course of nature to have caused her death. There was a possibility that the deceased might have died from violence from a source other than the respondent. Thus the evidence as to the commission of the offence of murder did not clearly point to the respondent, the unknown male or the Indian man mentioned by SP28 if indeed they were two different persons. Therefore the learned trial judge was correct in acquitting the respondent at the close of the prosecution's case without calling for his defence when the prosecution failed to establish a prima facie case which, if unrebutted would warrant a conviction. The presence of the unknown person clearly casts a doubt that the respondent was the one who caused the death of the deceased (see paras 69–70).

(5) The discretion under under s 60(1) of the CJA to order a trial judge to write a supplementary judgment should be sparingly exercised and would depend on the circumstances of the case and the nature of the omissions in the written grounds of judgment as opposed to what was said in the oral decision pronounced in open court. In this case, it would be wrong in principle to require the learned trial judge to supplement his written grounds of decision dated 12 August 2004. In the instant appeal, based on s 52 of the CJA and read together with s 307(3) of the CPC, the only judgment before the court was the signed copy of the grounds of decision dated 12 August 2004 as found in the appeal record and it would not be competent for this court, under the circumstances of this instant appeal, to order the learned trial judge to

supplement those grounds of decision. Furthermore, the points raised by the learned DPP in relation to the issues canvassed in the application would not have vitiated the appeal and hence a supplementary judgment was clearly out of the question (see paras 86, 89 & 94).

[Bahasa Malaysia summary

Responden telah didakwa di Mahkamah Tinggi Kuala Lumpur dengan kesalahan membunuh. Beliau didakwa telah membunuh seorang yang bernama Noritta bte Samsuddin pada 5 Disember 2003 di antara pukul 1.30 pagi hingga 4 pagi di dalam sebuah apartmen di Sri Hartamas('apartmen'). Mayat si mati telah ditemui dengan posisi mukanya terlangkup di tilam di atas lantai bilik tidurnya. Kepalanya ditutupi dengan sarung bantal dan kedua-dua kaki dan tangannya dalam keadaan terikat. Mulutnya disumbat dengan dua helai tuala muka. Mayatnya telah ditemui oleh SP12 dan SP28 yang mana sebelumnya menyedari satu bau badan kurang menyenangkan yang kuat di pintu masuk utama apartmen. Salah satu daripada dua tuala muka yang mana terkeluar daripada mulut si mati mengandungi DNA milik kepada individu lelaki yang tidak diketahui sebagai penyumbang kecil ('lelaki tidak diketahui'). DNA responden juga telah ditemui di tuala dan barangan lain yang berbeza daripada bilik si mati. Hakim bicara mendapati bahawa, walaupun ianya telah dipastikan bahawa si mati telah melakukan hubungan kelamin dalam tempoh 72 jam sebelum kematiannya, bukti tidak memastikan dengan kepastian yang mutlak bahawa responden adalah individu terakhir yang melakukan hubungan kelamin dengan si mati. Semasa penutupan kes pendakwaan, hakim bicara mendapati bahawa pihak pendakwa telah gagal untuk membuktikan kes prima facie dan responden mulai dari saat itu dibebaskan dan dilepaskan. Membantah keputusan tersebut, Pendakwa Raya telah merayu. Di hadapan mahkamah ini, teras utama Timbalan Pendakwa Raya yang bijaksana adalah antara lainnya: (1) bahawa hakim bicara menggunakan beban terlalu berat terhadap pihak pendakwaan pada penutupan kes pendakwaan yang mana beliau menggunakan 'ujian melangkaui batas keraguan' yang mana sepatutnya digunakan hanya semasa berakhirnya kes apabila menilai kes responden juga; dan (2) penolakan hakim bicara yang bijaksana, testimoni SP10 dan SP11 berdasarkan kepada tidak konsisten dan percanggahan di dalam keterangan mereka adalah salah yang mana hakim bicara yang bijaksana seharusnya tidak menolak keterangan mereka sepenuhnya tanpa mempertimbangkan bersama-sama bukti saintifik dan keterangan berdasarkan keadaan yang lain dan beliau seharusnya tidak menolak keterangan mereka dan apa yang sepatutnya dilakukan adalah sekurang-kurangnya menganggap mereka dengan rasa syak.

Berkenaan dengan bukti saintifik yang dikemukakan semasa perbicaraan, TPR menegaskan bahawa hakim bicara yang bijaksana tidak memberikan pertimbangan yang secukupnya kepada yang berikut: (1) bahawa sebab kematian adalah asfiksia dan ianya disebabkan oleh dua tuala yang direnyukkan (eksh P16A dan P16B) yang dimasukkan secara paksa ke dalam mulut si mati dan eksh P16A tersebut mengandungi profil DNA responden dan si mati; (2) kertas tisu adalah basah apabila mereka menemuinya daripada bakul kertas buangan di dalam bilik tidur si mati dan kesan air mani daripada kertas tisu mengandungi profil DNA responden yang mana menunjukkan bahawa beliau telah baru terlibat dengan hubungan kelamin dengan si mati; (3) lebam-lebam yang dikesan di kedua-dua peha si mati adalah disebabkan

oleh tekanan kuat dan berat oleh seseorang yang lain yang bersaiz besar menekan si mati; berhubungan dengan ini beliau menunjukkan bahawa susuk badan responden boleh melalui inferens menunjukkan bahawa beliau boleh menyebabkan lebam-lebam tersebut; dan (4) kematian si mati selepas hubungan kelamin berlaku dan bukti menunjukkan bahawa responden adalah orang terakhir yang melakukan seks dengan si mati dan dengan ini adalah bertanggungjawab di atas kematian si mati.

Pihak pendakwaan juga meminta untuk memohon mahkamah ini untuk menggunakan kuasanya di bawah s 60(1) Akta Mahkamah Kehakiman 1964 ('AMK') untuk mengarahkan/memerintahkan hakim bicara yang bijaksana untuk menulis penghakiman tambahan berkenaan dengan beberapa bahagian di dalam keputusan lisannya yang disampaikan di mahkamah terbuka pada 1 Julai 2004 tetapi tidak dimasukkan di dalam alasan penghakiman bertulisnya yang bertarikh 12 Ogos 2004. TPR yang bijaksana mendakwa bahawa apa yang tidak dimasukkan adalah dapatan yang salah dan yang tidak dimasukkan boleh menghalang beliau daripada mencabar perkara yang sama. Dapatan yang dikatakan tidak dimasukkan adalah: (1) bahawa ianya adalah tidak mengejutkan bahawa profil DNA responden dijumpai di eksh P16A, iaitu sehelai tuala muka yang mana dimasukkan secara paksa ke dalam mulut si mati yang mana tuala muka tersebut telah digunakan oleh responden yang mana adalah pelawat biasa bilik si mati; dan (2) ianya dikatakan bahawa responden telah bersama-sama dengan si mati sehari sebelum kejadian tetapi tiada eksperimen dilakukan ke atas kertas tisu yang dijumpai di dalam bilik tidur si mati yang mana seterusnya dijumpai mengandungi kesan basah air mani responden yang mana sama ada ianya berterusan kekal basah walaupun selepas 25 jam.

Diputuskan, menolak rayuan dan permohonan perayu:

(1) Hakim bicara tidak menggunakan 'beban yang terlalu berat ke atas pendakwaan pada akhir kes pendakwaan yang mana beliau menggunakan ujian melangkaui batas keraguan' sepertimana yang ditegaskan oleh TPR yang bijaksana. Hakim bicara yang bijaksana telah dengan cermatnya mengikut mahkamah ini dalam kes Looi Kow Chai yang dipertimbangkan adalah ujian sebenar yang mana perlu digunakan dalam menentukan sama ada kes prima facie telah menjadi di bawah s 180 Kanun Tatacara Jenayah (KTJ), iaitu seorang hakim yang mengadakan perbicaraan berseorangan di bawah s 180 KTJ mestilah menguasai bukti pendakwaan kepada penilaian yang maksimum pada penutupan kes pendakwaan dan bertanyakan dirinya sendiri persoalan iaitu jika beliau mengambil keputusan untuk memanggil tertuduh untuk memasukkan pembelaan dan beliau memilih untuk berdiam diri, adakah beliau bersedia untuk mensabitkannya dia atas keseluruhan bukti yang terkandung di dalam kes pendakwaan (lihat perenggan 39).

(2) Terdapatnya sebab-sebab yang diyakini untuk hakim bicara yang bijaksana untuk menolak keterangan SP10 dan SP11 dan adalah tidak selamat untuk mahkamah di bawah keadaan tersebut untuk bertindak berdasarkan keterangan yang meragukan dan sangsi yang sedemikian, mahkamah ini tidak dapat sampai kepada kesimpulan yang jelas bahawa hakim bicara yang bijaksana secara jelasnya melakukan kesilapan. TPR yang bijaksana telah gagal

untuk memuaskan hati mahkamah ini bahawa hakim bicara yang bijaksana telah melakukan kesilapan yang jelas dan keputusannya seharusnya bertentangan. Walaupun jika hakim bicara yang bijaksana menerima keterangan SP10 dan SP11 dan memutuskan bahawa responden adalah orang terakhir yang dilihat bersama-sama si mati, ianya tidak menunjukkan kesimpulan yang tidak dapat dibendung bahawa responden yang membunuh si mati (lihat perenggan 47).

(3) Apa yang jelas daripada bukti saintifik yang dikemukakan semasa perbicaraan adalah terdapatnya profil DNA lelaki yang tidak diketahui. Oleh yang demikian, hakim bicara yang bijaksana adalah benar dalam menyimpulkan bahawa pendakwaan tidak membuktikan bahawa responden adalah orang terakhir yang melakukan hubungan kelamin dengan si mati (lihat perenggan 52 & 58).

(4) Keterangan berdasarkan keadaan tidak menunjukkan secara kukuh bahawa kematian si mati adalah disebabkan atau berlanjutan daripada tindakan responden dan tindakan tersebut dilakukan dengan niat sama ada menyebabkan kematian atau menyebabkan kecederaan tubuh, mencukupi secara kebiasaannya untuk menyebabkan kematiannya. Terdapat kemungkinan bahawa si mati berkemungkinan mati daripada keganasan sumber lain selain daripada responden. Oleh yang demikian, bukti yang mana melengkapkan kesalahan membunuh tidak secara jelasnya ditunjukkan kepada responden, lelaki yang tidak diketahui atau lelaki India yang dinyatakan oleh SP28 sudah tentu mereka adalah dua orang yang berbeza. Oleh yang demikian, hakim bicara yang bijaksana adalah benar dalam membebaskan responden semasa penutupan kes pendakwaan tanpa memanggilnya untuk membela diri apabila pihak pendakwaan gagal untuk membuktikan kes prima facie, yang mana jika tidak disangkal menjadi alasan kepada sabitan. Kehadiran orang yang tidak diketahui secara jelasnya menandakan keraguan bahawa responden adalah orang yang menyebabkan kematian si mati (lihat perenggan 69–70).

(5) Budi bicara di bawah s 60(1) AMK untuk memerintahkan hakim bicara yang bijaksana untuk menulis penghakiman tambahan seharusnya digunakan dengan berhati-hati dan ianya bergantung kepada keadaan kes dan perkara yang tidak dimasukkan di dalam alasan penghakiman bertulis yang mana bertentangan kepada apa yang dikatakan di dalam keputusan lisan yang diumumkan di dalam mahkamah terbuka. Dalam kes ini ianya adalah salah secara prinsip untuk memerlukan hakim bicara yang bijaksana untuk menambah alasan keputusan bertulisnya yang bertarikh 12 Ogos 2004. Di dalam rayuan ini, berdasarkan kepada s 52 AMK dan dibaca bersama dengan s 307 KTJ penghakiman hanya di hadapan mahkamah adalah salinan alasan keputusan yang ditandatangani bertarikh 12 Ogos 2004 yang ditemui di dalam rekod rayuan dan ianya adalah tidak kompeten untuk mahkamah ini, di bawah keadaan untuk rayuan ini, untuk memerintahkan hakim bicara yang bijaksana untuk menambahkan alasan keputusan. Tambahan pula, perkara yang ditimbulkan oleh TPR yang bijaksana berkenaan dengan isu-isu yang dirayu di dalam permohonan adalah tidak merosakkan rayuan dan oleh itu satu penghakiman tambahan adalah jelas terkeluar daripada persoalan (lihat perenggan 86, 89 & 94).]

Notes

For cases on ground of judgement, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2086–2089.
For cases on inconsistancies in testimony, see 7(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2777–2783.
For cases on murder generally, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1078-1085
For cases on prima facie case, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2789–2797.

Cases referred to

Choo Chang Teik & Anor v PP [1991] 3 MLJ 423 (refd)
Chun Chwen Kong v PP [1962] MLJ 307 (refd)
Dato' Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232 (refd)
Idris v PP [1960] MLJ 96 (refd)
Khoon Chye Hin v PP [1961] MLJ 105 (refd)
Lai Kim Hon & Ors v PP [1981] 1 MLJ 84 (refd)
Looi Kow Chai & Anor v PP [2003] 3 MLJ 65 (folld)
Mohamed bin Kasdi v PP [1969] 1 MLJ 135 (refd)
Mohd Alias v PP [1983] 2 MLJ 172 (refd)
Nathan v PP [1972] 2 MLJ 101 (refd)
PP v Muhamad Nasir bin Sharuddin & Anor [1994] 2 MLJ 576 (refd)
PP v Wan Razali Kasim [1970] 2 MLJ 79 (refd)
Pendakwa Raya v Rungit Singh a/l Jaswant Singh (Mahkamah Rayuan Rayuan Jenayah No P–05–60–98, unreported) (refd)
R v Abbot [1955] 2 All ER 899 (refd)
R v Storey and Anwar [1968] 52 Cr App R 334 (refd)
Shamsuddin bin Hassan & Anor v PP [1991] 3 MLJ 314 (refd)
Tan Boon Teck v PP [1950] MLJ 44 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 52, 60(1)
Criminal Procedure Code ss 180, 307(3), 402A
Dangerous Drugs Act 1952 s 39B
Evidence Act 1950 s 103 Illustration (b)
Penal Code ss 302, 354, 377D

Tun Abd Majid Tun Hamzah (Roszianayati Ahmad and Nahra Dollah with him) (Attorney General's Chambers) for the appellant.
V Sithambaram (N Rajivan, Mohd Haaziq Pillay and Robert Devan with him) (Sitham & Associates) for the respondent.

Mohd Ghazali JCA (delivering judgment of the court):

[1] The respondent was charged in the High Court, Kuala Lumpur with the offence of murder under s 302 of the Penal Code ('the Code'). He was alleged to have murdered one Noritta bte Samsuddin on 5 December 2003 between 1.30 am to 4 am

in an apartment known as No D-7-1, Kondominium Puncak Prima, Galleria, Jalan 17, Sri Hartamas, district of Brickfields, Kuala Lumpur ('said apartment').

[2] At the close of the prosecution's case, the learned trial judge, Abdul Hamid Embong J found that the prosecution had failed to establish a prima facie case and the respondent was henceforth acquitted and discharged. Against that decision, the Public Prosecutor appealed. We had dismissed the appeal by the Public Prosecutor and we hereby give our reasons for doing so.

ENCLOSURE 10A

[3] At the outset of the hearing of this instant appeal, the learned deputy public prosecutor (DPP) referred to encl 10a which is an application by the Public Prosecutor to move this court to exercise its powers under s 60(1) of the Courts of Judicature Act 1964 ('CJA') to direct/order the learned trial judge to write a supplementary judgment in respect of certain parts of his oral decision delivered in open court on 1 July 2004 but omitted from his written grounds of decision dated 12 August 2004 (pp 473–534 of the appeal record). The learned DPP argued that what were omitted are erroneous findings and its omission would deprive him from challenging the same. After hearing arguments, we dismissed the application. We will give our reasons later in this judgment.

The facts

[4] The facts showed that at the material time, Kenneth Michael Yap Tiek Huat (SP12), Nor Azora bte Abdul Hamid (SP28) and Noritta bte Samsuddin ('deceased') were occupants of the said apartment. There were three bedrooms in the said apartment. SP12 occupied the master bedroom which had an attached bathroom with SP28 who was his live-in girlfriend. The deceased occupied another bedroom. The third bedroom was used as a store. SP12 had been occupying the said apartment for about 2½ years at the material time. The deceased moved in around July 2003 and paid a monthly rent of RM550 to SP12.

[5] Prior to her death, the deceased was working as an executive with a company called Syarikat Transpro Sdn Bhd ('Transpro'). She had worked with Transpro since 2002 and earned about RM2,000 per month inclusive of an allowance of RM500. According to Ramli bin Dahalan (SP7), a director of Transpro, her job does not entail her to entertain the company's clients.

[6] On 4 December 2003, at around midnight, SP12 left the said apartment with PW28 and went to the Viva Club in Eastin Hotel where they stayed till around 3.40am, ie on 5 December 2003. They then went back to the said apartment which is about 20 to 30 minutes drive from Eastin Hotel and upon arriving home discovered the dead body of the deceased in her bedroom covered with a comforter. Her body was found faced downwards on the mattress on the floor of her bedroom. Her head was covered with a pillow case and both her hands and legs were tied.

She was completely naked. The circumstances surrounding the discovery of the body of the deceased, as described by the learned trial judge in his grounds of decision, are as follows:

> On 5 December 2003 at about 4.30am Kenneth [SP12] and Azora [SP28] arrived home together. They found the house not lighted up which surprised Kenneth as normally the understanding between the housemates was to leave the dining room light on upon leaving the house. The house was however dimly lighted by the beam of the street lights coming in through the sliding door in the living room but it was too dark for Kenneth and Azora to recognize anyone passing by them in that condition. Both Kenneth and Azora had not bothered to switch on the light (the switch being some distance away) upon entering their house as they were both heading straight for their bedroom and that they could grope their way even in that partial darkness.
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> Upon unlocking the main door and entering the house both of them notice a strong, unpleasant body odour at the main entrance area and the corridor leading to the dining table. Kenneth checked the shoe rack area to see if there were any visitor's shoes which emitted the repulsive smell but saw none. Nor Azora's reaction to the smell was that she thought the deceased had a visitor. It was the first time she had encountered that repulsive smell. Upon entering, Kenneth locked the main door and both of them proceeded to their bedroom with Nor Azora walking about five feet behind him. When Kenneth unlocked their bedroom door he noticed that the deceased's room was closed but it was not lighted. While walking to their room, Nor Azora had noticed a silhouette of a man to her right but ignored what she saw. Kenneth and Nor Azora had been out drinking that night. She had consumed two stout and also shared Kenneth's beer. She said she was a bit 'high' but was aware of things. Kenneth also said that Azora can drink 'a fair bit but she can hold her drinks'.
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> When Kenneth opened their bedroom door he switched on the room light. Upon entering their room Nor Azora asked Kenneth if he had seen someone in the house. He said he didn't and did not pay much attention to Nor Azora's question as he thought it was just her imagination. Nor Azora felt uneasy and left the bedroom to look for the man she thought she had seen earlier. She went out to the hall area and the kitchen but found no one. She then realized that the main door had been unlatched, whereas Kenneth had earlier locked the door. Nor Azora felt funny and asked Kenneth to enquire from the guards if any visitor had come to their house. Together they called out the deceased's name but got no response. When Kenneth went down to the guardhouse to enquire, Nor Azora noticed that the deceased's room door was slightly ajar. She peeped into the room and switched on the light but did not instantly notice the deceased's body lying under the comforter. She saw some items in the room strewn on the floor and called out the deceased's name. She then pulled the comforter and saw the deceased's body lying in a position earlier described. Nor Azora panicked and ran to her room and shouted from her bedroom window to Kenneth who was then downstairs at the guardhouse, asking him to come up quickly.
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> She then ran out to the neighbour's house to call for help but there was no response. She then went back to her room to again call to Kenneth, but on that occasion, did not see him.
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> At the same time she saw the figure of a man downstairs walking towards the guardhouse and putting his shirt on and thought he was the same man she had seen earlier in her house. She shouted at the person 'bastard, stop, I think you are a killer'. She also called on her mobile phone, her Finnish friend, Mikko, with whom she had had a drink earlier that night.

Nor Azora then shouted to the guards at the guardhouse asking them to stop the man she saw downstairs. There was no response from the guards. She then rushed out of her house to go downstairs to look for that person. When she reached the lift, Kenneth and a security guard she identified as Maniam had arrived. When Kenneth reached the 7th floor, Nor Azora rushed into the lift and took the lift down together with Maniam, saying something to Kenneth which he could not make out. A confused Kenneth took another lift down again to ask Nor Azora what had happened. Nor Azora told him that he had seen a man walking towards the guardhouse whom she believed to be the same man she had earlier seen in their house. Kenneth then asked (SP11) Thanabalan, the chief security guard to follow him up. When Kenneth entered the deceased's room he found her in the same position as described by Nor Azora. He called out her name 'Ita' but she did not respond. He then untied the pillow case covering her head. He found a bolster case tied around her face, covering her mouth, and untied the knot at the back of her head. When that was undone a piece of face towel crumpled into a ball (P16) fell out of the deceased's mouth. Kenneth then cut off the cord tied around the deceased's hands with a knife he had fetched from the kitchen. SP11 was in the room with Kenneth but did not assist him. Kenneth kept calling out the deceased's name but there was no response. Mikko then arrived into the room and told Kenneth that the deceased's lips had turned blue and suggested a CPR on her. Kenneth said he did not know the procedure and Mikko suggested that SP11, the security guard may know how to do it. When asked, SP11 refused. Mikko then turned over the deceased's body and together with Kenneth tried to resuscitate the deceased with a CPR but they failed to revive her. After failing to revive her, SP12 contacted the police.

[7] In the course of police investigation, various articles were taken from the deceased's room by the police including the following:

(a) three samples of seminal stains from the mattress;

(b) 11 pieces of tissue paper found in a waste paper basket; and

(c) all the articles used to tie up the deceased.

THE POST-MORTEM ON THE DECEASED

[8] SP13, the doctor who conducted the post-mortem on the deceased opined as follows:

(i) from various spots of multiple petechial haemorrhages found on different parts of the deceased's body such as her chin, eyes, fingernails, the deceased died of asphyxia;

(ii) from the traces found on the deceased's legs from the knots tied around her arms and legs, that the knots were fastened after the death of the deceased in view of the non-existence of vital signs such as bleeding or blood spots which would be a normal reaction to such an act;

(iii) that the bruises found on both the deceased's thighs were possibly caused by pressure from someone who is big and heavy and that they were caused before her death; the pressure possibly came from someone pressing his knees on those areas.

[9] SP13 also found old hymen tears, meaning more than 72 hours, at 3, 6 and 9 o'clock in the external genitalia of the deceased. Tears at similar locations were also

seen in the anus save that they were recent tears, ie, less than 72 hours and blood marks were also detected there. He was of the view that these tears could have been caused by something blunt like a penis or finger. In the deceased's vagina, he found an unusually large amount of fluid which was a collection of semen and the deceased's fluid. He opined that sexual intercourse had occurred prior to the deceased's death.

[10] Upon internal examination, SP13 found bruises on the tongue and haematoma at the left side of the epiglottis, ie the tissue at the base of the tongue. SP13 was of the opinion that a piece of face towel like exh P16A which fell out of the deceased's mouth when SP12 untied the bolster case tied around that area could have caused those injuries if forced into the deceased's mouth. Her thyroid gland was congested. He was of the opinion that forcing an article like a piece of face towel into the deceased's mouth could have caused her death since the collapse of her tongue from that force could cause the deceased to choke. He was of the view that the death was wilfully caused and ruled out accidental death in view of the injuries to the tongue sustained by force. He observed that there were no signs of clawing or fracture and that the negligible injuries found suggested that the sexual acts were consensual.

[11] SP13 disagreed with the suggestion of the respondent's counsel that the deceased had died of sexual asphyxia which is an act of deliberate induction or enhancement of orgasm by self-hypoxia. This act, he explained, is normally done by males upon themselves and that its common feature is self inflicted injuries which he could not detect in this case. He opined that the severe injuries found on the deceased's tongue caused by force ruled out the possibility that she died of sexual asphyxia.

[12] SP13 also took various specimens of the deceased's blood, vaginal swabs, fingernails and anal swab on the request of the investigation officer and all these specimens were all sent to the Chemistry Department, Petaling Jaya for deoxyribonucleic acid (DNA) testings.

DNA PROFILING

[13] According to the *Concise Oxford Dictionary* (9th Ed), DNA which is an abbreviation for deoxyribonucleic acid, is a self replicating material which is present in nearly all living organisms, especially as a constituent of chromosomes, and is the carrier of genetic information.

[14] SP14, a chemist and the Head of Crime DNA Unit at the Serology and DNA Section of the Chemistry Department, Petaling Jaya testified that he received a total of 116 specimens and items from ASP Shahrul and all but four were analysed for DNA profiling. He stated that DNA which is a genetic material found in the nucleus of the cells, which molecules make up the chromosomes, is actually the blueprint of all human beings and that DNA profiling is a technique where a person's DNA is analysed. He explained that no two persons except for identical twins have identical chromosomes. He also explained in detail the process and methodology of obtaining a DNA profile. He stated that a DNA profiling with almost positive certainty would

be able to identify someone whose evidence sample is the same as the reference sample. The DNA profiling was done by making comparisons with the DNA profiles developed from the reference sources, ie the respondent's and the deceased's blood samples.

[15] SP14's findings, summarized by the learned trial judge in his grounds of decision, included the following:

(i) in relation to exh P16A, one of the two pieces of face towel that fell out of the deceased's mouth, there were found the mixed DNA profiles of at least three persons, namely:

(a) the deceased as a major contributor, viz, 70% to 75% composition of the DNA extracted of the mixed stain;

(b) the respondent as an intermediate contributor, viz, 20% to 25%; and

(c) an unknown male person as a minor contributor, viz, about 5% and which SP14 named in his report as 'Unknown Male 1' (hereafter referred to as 'the unknown male');

(ii) In relation to exh P16B, the other piece of face towel that came out of the deceased's mouth, the DNA profile of the deceased was found;

(iii) From the bolster case (exh P15) the DNA profile developed from the seminal stains found thereon was that of the respondent; from the non-sperm cells DNA extracts from the semen stains, the DNA profiles of the respondent and the deceased were found;

(iv) From the 11 pieces of tissue paper (exh P29 'a' to 'k') recovered from the waste paper basket in the deceased's room, eight pieces were found to bear seminal stains, with spermatozoa, and the DNA profile was that of the respondent; the non-sperm cell DNA extracts from the semen stain contained the mixed DNA profiles of both the respondent and the deceased; in relation to this, he also conducted a simple experiment on similar porous tissue papers and found that the seminal fluids dropped on them would dry up within half an hour to an hour depending on the amount of semen drops applied;

(v) In relation to the seminal stains found on the bedsheet (exh P19), the sperm and non-sperm cells DNA extracts bore the DNA profiles of both the respondent and the deceased;

(vi) from the comforter (exh P13) seminal stains found bore the DNA profiles of both the respondent and the deceased;

(vii) the cut portions of the mattress (exhs P72A, P73A and P74A) bore the DNA profiles of the respondent and the deceased.

[16] From the mixed DNA profiles of the respondent and the deceased from the seminal stains found on the mattress, bolster case, bedsheet, comforter and tissue papers SP14 was of the opinion that sexual intercourse had taken place.

THE DNA PROFILE OF THE UNKNOWN MALE

[17] SP14 also testified that in his analysis, he detected the DNA profile of the unknown male, namely:

(a) from the bolster (exh P38), semen stains were found which did not match the DNA profiles of any of the blood stain specimens that he received, but a male DNA profile was detected, ie, the unknown male;

(b) from the black brassierre (exh P82), he also found it to contain the DNA profile of the same unknown male from his analysis of the semen stain found on it;

(c) from the fingernail clippings of the right hand of the deceased the DNA profiles developed were that of the respondent and the deceased; from the fingernails of the deceased's left hand there were the DNA profiles of the deceased, the respondent and the unknown male;

(d) the strands of hair (exh P35) recovered by the police forensic team and from the deceased's comforter and bedsheet, the DNA profile was that of the unknown male which matched with the DNA profile found on the bolster (exh P38);

(e) the electrical cord (exh P17A) used to tie the legs of the deceased the mixed DNA profiles developed were that of the unknown male and the deceased;

(f) from the black liquid (exh P70), ie the rectal swab of the deceased (the black liquid being a preservative), the DNA profile was that of the unknown male;

(g) the cotton swab (exh P88) he detected a mixed DNA profile of both the deceased and the unknown male;

(h) from the vaginal swabs (both high and low ends) of the deceased (exh P25), a mixed DNA profile of three individuals being the respondent, the deceased and the unknown male were found; from the high vaginal swab, he concluded that contribution of the seminal stain to be in the following proportions:

(i) major contributor, 60% to 70% — the respondent;

(ii) intermediate contributor, 20% to 25% — the deceased;

(iii) minor contributor, 10% to 15% — the unknown male.

[18] SP14 was of the view that based on the above findings, it normally indicated that the respondent was the last person to have had sexual intercourse with the deceased, and that would be dependent on a number of factors, such as:

(a) the volume of semen ejaculated into the vagina;

(b) the number of spermatozoa contained in the ejaculated semen; and

(c) the lapse of time between the two sexual intercourse where semen was ejaculated into the vagina.

[19] SP14 could not however say with absolute certainty that the respondent was the last person to have sexual intercourse with the deceased. He stated that there was a greater concentration of DNA material in the high vaginal swab as opposed to the low vaginal swab. He also agreed with learned counsel for the defence that the sperm and other DNA materials would remain for a longer period in the upper vaginal region as opposed to the low vaginal region and that immediately after ejaculation there would be a higher concentration of sperm in the lower vaginal region. He was also unable to say if sexual intercourse had occurred before or after the deceased's death. From the rectal swab he also confirmed that there had been anal sex which he said was performed by the unknown male but he could not say if that happened prior to or after the deceased's death.

[20] In the course of the trial, two security guards who were on duty at the condominium at the material time were called by the prosecution. They were Suzaki bin Supok (SP10) and Thanabalan a/l Kobal (SP11).

SP10

[21] SP10 stated he commenced working as a security guard at the condominium from 17 July 2002. His working hours were between 8pm to 8am and he worked for seven days a week. His duties include recording the particulars of visitors, the time of arrival and departure, the unit which they intend to visit, retaining their identity cards and issuing them with passes and obtaining the permission of the tenant concerned through the intercom before allowing them to enter the premises. He will not record the visitor's particulars if he enter the premises accompanied by the tenant or if the tenant comes down to greet the visitor. If the visitor is known to him, he will allow him to enter without recording the visitor's particulars and without even being accompanied by the tenant.

[22] In his evidence, he said he was familiar with the tenants occupying the said apartment and knew that the deceased was an occupant of the said apartment. He stated that the respondent was a regular visitor and would normally come into the condominium with the deceased at about 2am. He claimed that on the day of the incident he saw the respondent entering the condominium before 1am. He was alone in the guardhouse leading to the condominium whilst another guard (SP11) was outside the guardhouse. He later saw the respondent and the deceased talking by the roadside fronting the condominium with two Malay couples who came in a Kancil motorcar. He described that the respondent was wearing a white-collared t-shirt whilst the deceased was dressed in a baggy t-shirt and was wearing shorts. The respondent and the deceased subsequently entered the condominium. He did not see the respondent leaving the condominium that morning. At about 4.30am, he was informed by SP11 by walkie-talkie while on duty at the swimming pool area that an apartment unit had been broken into. He then went to the guardhouse and waited there until morning.

[23] Under cross-examination, SP10 stated he was called to the police station on the day of the incident and thereafter for 11 days. His statement was recorded on 8 December 2003. On 18 December 2003, he was arrested and remanded for three

days. He stated that it was only when he was remanded that he could remember what transpired in the early morning of the day of the incident. He also stated that he described to the police that on 4 December 2003, ie one day before the day of the incident a man who is about six feet tall and with short hair and wearing a pair of jeans and a white shirt did come to the condominium but denied that such a person came on 5 December 2003.

SP11

[24] SP11 stated that on the day of the incident, he was on night shift which was from 7pm to 7am. He was in charge of the shift. He said that on the day of the incident, he saw a white Kancil motorcar parked across the road in front of the guardhouse. He saw two Malay couples in the Kancil motorcar talking to the respondent and the deceased. He then saw the respondent and the deceased entering the condominium. He said the respondent was a regular visitor and he had seen him on several occasions after 1am. He would usually come in with the deceased and would leave about an hour later. As it was the deceased who usually brought the respondent in, he never registered the respondent's particulars in the visitor's book. He observed that on the day of the incident, the respondent was wearing blue jeans and a grey coloured t-shirt whilst the deceased was wearing black shorts and singlet. He was on duty until 7am and did not see the respondent leaving the condominium.

[25] At about 4.15am on the day of the incident, he contacted SP10 as he heard a scream that someone had entered the said apartment. He was then in guardhouse. He saw SP28 screaming from the balcony of the said apartment saying that someone is running away. He then walked towards the apartment block with another security guard, ie Maniam and met SP12 and SP28 on the ground floor. He informed SP28 that he did not see anybody running away. He then went up to the said apartment with SP12 and in one of the bedrooms saw the body of the deceased covered with a blanket. Subsequently, SP12 called the police. As he did not know how to carry out a CPR as requested by SP12 he left the said apartment and went back to the guardhouse and called his superiors.

[26] Under cross-examination, SP11 stated that the police came at about 5.15am on the day of the incident and one Inspector Mohan interviewed him in the guardhouse. He could not remember whether he signed a statement that morning but admitted that he never mentioned to Inspector Mohan that he saw the respondent at about 1am that morning neither did he mention having seen the respondent and the deceased talking with the two Malay couples in the Kancil motorcar. SP11 further admitted that he never made any reference to the respondent when he was interviewed by the police for the second time, viz by one ASP Shahrul.

[27] He was later arrested as a suspect on 17 December 2003 and was remanded for three days and that was when he gave a third statement to the police wherein he recalled that on 4 December 2003, ie one day before the day of the incident he saw the respondent and the deceased walking into the condominium at about 2am and that the respondent later left at about 3am. He also admitted that he only informed the police about this after he was arrested as a murder suspect. His explanation for

the earlier omission was that he had forgotten about it. He later insisted that only his third statement to the police was truthful. He also admitted that he had earlier denied that he knew the respondent when he was shown his photograph by the police.

[28] The learned trial judge was of the view that the evidence of SP10 and SP11 was 'crucial to the foundation of the prosecution's case' and as such conducted a thorough examination on their testimonies. In relation to SP10, he had this to say:

> His explanation that he came to recollect his sighting on the accused and the deceased that morning on 5 December 2003, only after a great deal of contemplation when he sat down each night at the guardhouse from 5 December 2003 until 18 December 2003, is to this court, an utter fabrication, and in direct contradiction with his clear memory of the other details of events, which he had previously so articulately narrated, as discussed above. This court found this explanation as totally unacceptable and unbelievable, and one as exposing his dubious and unreliable character.

In relation to SP11, he said:

> After having seen SP11's demeanour and having appraised his oft-doubtful responses on this crucial aspect, I am of the view that SP11 had not been a truthful witness. He explanation that he was in such a 'panic mood' to even inform the police on that morning itself, that he had seen the accused together with the deceased, is to this court, implausible and unacceptable. Considering that he was the person in charge of the security team that night, surely an important event on the sighting of the accused together with the deceased would not have so easily slipped his mind, especially merely minutes after the discovery of the deceased's body. And surely too he could have easily recalled his sighting of the accused with the deceased that early morning and informed the police of it, prior to his subsequent arrest and without the strain of those persistent questionings by the police. Thus even without his open admission in court that he had previously lied to the police, it is my finding that SP11 is an unreliable witness whose credibility was put in much doubt by his own words and performance whilst giving evidence in this court.

[29] In his overall evaluation of the evidence given by SP10 and SP11, the learned trial judge said:

> The evidence of both SP10 and SP11 were harmonious on the aspect of sighting the accused and the deceased coming into the condominium together at 1am on 5 December 2003. Both had been positive of seeing them, although SP11 stated that he had not seen them exiting the condominium to meet up the four persons at the Kancil, even though he was then standing at the entrance gate. Learned counsel during submission had adverted to some contradictions in both their testimony eg, the different top worn by the deceased; SP10 saying it was a loose long T-shirt; the colour of the accused's T-shirt, that both accused and the deceased walking in holding hands according to SP11 whilst SP10 said that they walked one behind another. These contradictions according to learned counsel although seemingly minor on their own, show that they were divergent in details because their evidence were cooked-up stories, made up by both witnesses under constant and incessant questioning by the police who wanted them to agree that they had sighted the accused together with the deceased at 1am on 5 December 2003 and not the morning before, ie at around 2am on 4 December 2003 as they had already informed the police in their earlier statements. As such, the discrepancies became material in this court's assessment of these witnesses' evidence. This court agrees with this view taken by learned counsel on this aspect of contradictions in their evidence and found this to be an instance exemplifying the untruthfulness of both SP10 and SP11.

> This court had had the benefit of seeing and hearing both these witnesses and their performances can only be concluded as one abhorrent harmonious lie on this crucial aspect of the evidence, which must be absolutely rejected. It goes without saying that this court is duty bound to separate the chaff from the grain and must be most careful and circumspect in the face of the evidence adduced by these two dubious witnesses.

He later concluded as follows

> This was a case in which the credibility of these two star witnesses for the prosecution was of major importance. Any gaps on their narrative on this crucial aspect of their narrative on their observation must be fully scrutinised by this court even at this stage of the proceedings.

[30] In my assessment of these two witnesses, I am guided by the principles laid down in *Khoon Chye Hin v Public Prosecutor* [1961] MLJ 105 and *Mohamed bin Kasdi v Public Prosecutor* [1969] 1 MLJ 135. In the first case, Thomson CJ had stated that:

> If a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinized with great care and indeed with suspicion.

In the second case above, it was held by Ali J that:

> No hard and fast rule can be laid down for determining the credibility or otherwise of a witness, but when a witness gives or makes two statements which differ in material particulars there must necessarily be ground for believing that he is not a truthful witness.

> In this case both SP10 and SP11 had incredibly changed their earlier statements to the police on the most crucial aspect of this case, for reasons which are neither believable nor acceptable to this Court; not counting their legal duty to state the truth to the police under s 112 of the Criminal Procedure Code.

[31] In his evaluation of the scientific evidence introduced, the learned trial judge summarized his findings as follows:

(i) that the deceased died of asphyxia due to choking;

(ii) there was no sign of any struggle found on the deceased's body;

(iii) that the respondent and the unknown male had had sexual intercourse with the deceased within 72 hours of her death;

(iv) that the deceased died after the act of sexual intercourse;

(v) anal intercourse was performed on the deceased by the unknown male; the fresh tear and bleeding detected from deceased's anus showed that this act had taken place within 72 hours of her death;

(vi) the electrical cord (exh P17A) and the brassiere (exh P82) used to tie up the deceased contained the DNA profiles of the unknown male and the deceased; the act of tying the deceased's legs was done after her death;

(vii) the strands of hair recovered from the deceased's bedsheet and the comforter matched the DNA profile of the unknown male;

(viii) the test conducted by SP14 on the crumpled tissue papers (exh P29 'a' to 'k') could not with certainty say that the respondent was the last person to have had sexual intercourse with the deceased;

(ix) the fingernail clippings of the deceased revealed the presence of the DNA profiles of both the respondent and the unknown male, proving that she had come into contact with both men;

(x) the face towel (exh P16A) that dropped out of the deceased's mouth contained the DNA profiles of the respondent, the deceased and the unknown male.

[32] Based upon the above findings, the learned trial judge concluded that the scientific evidence standing alone had not enabled the prosecution to establish at this prima facie stage of the proceedings that the respondent murdered the deceased neither did it even establish that the respondent was the last person to have been with the deceased. He held that the unknown male was in all likelihood the last person that was with the deceased based upon the following:

(a) the opinion of SP13, which the court accepts, that the knot tied around the deceased feet was done after her death;

(b) the materials used for tying those knots, viz the electrical cord and the brassiere were found to carry the DNA profile of the unknown male;

and also after taking into account the fact that the unknown male had both vaginal and anal sexual intercourse with the deceased within 72 hours of her death he found that the most logical inference is that the unknown male was the last person to be in physical contact with the deceased.

[33] The learned trial judge further held that it was also not proven that the respondent was indeed the last person to have had sexual intercourse with the deceased although sexual intercourse did take place between the respondent and the deceased within 72 hours of her death.

[34] At the end of the day, the learned trial judge ruled that the prosecution has failed to make out a prima facie case against the respondent. He said that on the charge of murder, the prosecution must prove the following ingredients:

(i) that the death of Noritta bte Samsuddin, ie the 29 deceased had taken place;

(ii) that her death had been caused by or in consequence of the act of the respondent; and

(iii) such act was done with the intention either of causing death or of causing bodily injury sufficient in the ordinary course of nature to have caused her death.

[35] The learned trial judge found that the first ingredient was proven beyond dispute but not the second and third ingredients and henceforth acquitted and discharged the respondent.

THE APPEAL

[36] Before this court, the main thrust of the learned DPP was that the learned trial judge applied too heavy a burden on the prosecution at the close of the case for the prosecution in that he adopted the 'beyond reasonable doubt test' which ought to be applied only at the end of the whole case upon evaluating the case for the respondent as well. In relation to this, he referred to the learned trial judge's grounds of decision (p 526 of the appeal record) where he said:

> Thus, in determining whether at this stage of the trial, a prima facie case has been made out by the prosecution, this court is obliged to scrutinize these circumstantial evidence on a maximum evaluation yardstick in order to determine if those strands of evidence have satisfied the legal requirements to support a finding of a prima facie case. And in doing so, it becomes necessary for this court to consider the gaps and inferences that arose from those circumstantial evidence, in accordance with the principles as discussed earlier.

[37] The learned DPP argued that despite making references to the authorities on the meaning of prima facie, the learned trial judge missed the reminder by this court in *Looi Kow Chai & Anor v Public Prosecutor* [2003] 3 MLJ 65.

[38] We have perused in detail the grounds of decision of the learned trial judge and we cannot see where he applied 'too heavy a burden on the prosecution at the end of the prosecution's case in that he adopted the beyond reasonable doubt test' as contended by the learned DPP. From our reading of the grounds of decision, we find that the learned trial judge had religiously followed what this court had in *Looi Kow Chai* considered would be the correct test that is to be applied in determining whether a prima facie case has been made out under s 180 of the Criminal Procedure Code ('CPC'), ie a judge sitting alone under s 180 of the CPC must subject the prosecution evidence to maximum evaluation at the close of the prosecution case and ask himself the question, viz if he decide to call upon the accused to enter his defence and he elects to remain silent, is he prepared to convict him on the totality of the evidence contained in the case for the prosecution. This was how this court propounded the test in *Looi Kow Chai*. In delivering the judgment of this court, Gopal Sri Ram JCA said (at pp 80–81):

> In our respectful view, the correct test to be applied in determining whether a prima facie case had been made out under s 180 of the CPC (and this would apply to a trial under s 173 of the Code) is that as encapsulated in the judgment of Hashim Yeop Sani FJ (as he then was) in *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 at p 270:
>
> > To summarize, it would therefore appear that having regard to the prosecution evidence adduced so far, a prima facie case has not been established against Nordin Johan and Aziz Abdullah, the second accused and the fourth accused which, failing their rebuttal, would warrant their conviction. In other words if they elect to remain silent now (which I hold they are perfectly entitled to do even though they are being tried under the Emergency Regulations) the question is can they be convicted of the offence of s 302 read with s 34 of the Penal Code? My answer to the question is in the negative.

We are confident in the view we have just expressed because we find nothing in the amended s 180(1) of the CPC that has taken away the right of an accused person to remain silent at the close of the prosecution case. Further we find nothing in the legislative intention of Parliament as expressed in the language employed by it to show that there should be a dual exercise by a judge under s 180 when an accused elects to remain silent as happened in *Pavone v Public Prosecutor* [1984] 1 MLJ 77. In other words we are unable to discover anything in the language of the recently formulated s 180 that requires a judge sitting alone first to make a minimum evaluation and then when the accused elects to remain silent to make a maximum evaluation in deciding whether to convict or not at the close of the prosecution case.

It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the CPC has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made and the accused would be entitled to an acquittal.

[39] The 'reminder' in *Looi Kow Chai,* as the learned DPP put it, is this at p 83 Gopal Sri Ram said:

In *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at p 63, Augustine Paul J made the following observation which has since received approval sub silentio from the Federal Court (see [2002] 3 MLJ 193):

> Notice to be given of defence of alibi
>
> A prima facie case arises when the evidence in favor of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a prima facie case has been made out in order to call for the defence.

In our judgment, the foregoing passage correctly states the law as it presently stands. But, we would emphasize and make it amply clear that there is no burden on the prosecution to prove its case beyond a reasonable doubt at the close of the prosecution's case. Whether it has done so, is a question that must be dealt with at the close of the whole case.

[40] In the instant appeal, the learned trial judge never said nor suggested that the burden on the prosecution at the close of the case for the prosecution is to prove its case beyond reasonable doubt. The DPP's complaint as such is without merit.

[41] Another ground of complaint raised by the learned DPP is in relation to the evidence of SP10 and SP11. He pointed out that the learned trial judge rejected their

testimonies in view of the inconsistencies and contradictions in their evidence and held them to be totally unreliable. He argued that the learned trial judge 'cannot reject their evidence in toto without considering the scientific evidence and other circumstantial evidence together' and that he ought not to have rejected their evidence and what he should have done 'was at least to treat them with suspicion'.

[42] From our reading, SP10 and SP11 were called by the prosecution for only one purpose, ie to show that they had seen the respondent at the condominium at about 1am of the day of the incident. In his evidence, SP10 admitted he did not inform the police when he was questioned by the police in the morning of the day of the incident that he saw the respondent with the deceased in the condominium at about 1am that day. It was only when he was arrested on 18 December 2003, ie about 13 days later that he informed the police that he saw the respondent with the deceased at about 1am on the day of the incident. His reason for that lapse of memory was that he was 'confused'. Similarly, in his evidence, SP11 admitted he did not inform the police when he was questioned by the police in the morning of the day of the incident that he saw the respondent with the deceased in the condominium at about 1am that day. He only informed the police about that sighting after he was arrested and remanded on 17 December 2003 and that was after he had given two earlier statements to the police. His reason for the lapse in memory was that he had 'panicked'. He said he did not suspect that the respondent would have committed such a crime.

[43] In relation to this, the learned DPP submitted it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not to believe him in that his testimony is so incredible or improbable, or its so shaken during cross-examination, or its wholly inconsistent or contradictory to evidence of other witnesses which renders the whole of his testimony doubtful and suspicious and renders it unsafe to be accepted or relied upon. Generally, we would agree with the learned DPP. But then, this court did not have the advantage of seeing and hearing SP10 and SP11 and therefore of assessing their credibility. In *Public Prosecutor v Wan Razali Kasim* [1970] 2 MLJ 79, Azmi LP said (at p 82):

> An appellate court should be slow to interfere with the finding of fact by a lower court as an appellate court does not have the advantage of seeing and hearing the witnesses and therefore of assessing their credibility. As Lord Diplock had stated in *Tan Chow Soo v Ratna Ammal* [1969] 2 MLJ 49 at p 50:
>
> > An appellate court, particularly where there is no full transcript of the oral evidence, is in a far less advantageous position to decide an issue of credibility than the trial judge who heard the evidence in full and observed the witnesses as they gave it, noting their pauses and their hesitations and any visible signs of confidence or embarrassment.

[44] In *Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 84, Abdul Hamid FJ (as he then was) said (at p 93):

> Viewed as a whole it seems clear that the finding of fact made by the trial judge turned solely on the credibility of the witnesses. The trial judge heard the testimony of each witness and

had seen him. He also had the opportunity to observe the demeanour of the witnesses. Discrepancies will always be found in the evidence of a witness but what a judge has to determine is whether they are minor or material discrepancies. And which evidence is to be believed or disbelieved is again a matter to be determined by the trial judge based on the credibility of each witness. In the final analysis it is for the trial judge to determine which the evidence of a witness he is to accept and which to reject. Viewed in that light we did not consider it proper for this court to substitute its finding for that of the learned trial judge.

The principle of law governing appeals in criminal cases on questions of fact is well established, in that the Appeal Court will not interfere unless the balance of evidence is grossly against the conviction especially upon a finding of a specific fact involving the evaluation on the evidence of a witness founded on the credibility of such witness.

[45] In his submission, learned counsel for the respondent insisted that the learned trial judge was correct in rejecting their evidence. We agree. What is clear to us is that SP10 only admitted to the police that he saw the respondent and the deceased together in the condominium at about 1am on the day of the incident after he was arrested on 18 December 2003. Similarly SP11 admitted to the police that he saw the respondent and the deceased together in the condominium at about 1am on the day of the incident after he was arrested and remanded on 17 December 2003. They were both questioned by the police on the morning of the day of the incident but seemed to have suffered a 'lapse' in memory. PW10 claimed he was 'confused' whereas PW11 claimed he 'panicked'. PW11 also admitted that when he was shown a photograph of the respondent in the course of police investigations, he claimed he could not recognise the respondent from the photograph until he was arrested and remanded on 17 December 2003. That was when he was able to recognise the respondent from the photograph.

[46] We are of the view that there were cogent reasons for the learned trial judge to reject the evidence of SP10 and SP11 and that it was unsafe for the court under such circumstances to act upon evidence which is doubtful and suspicious and as such, we do not think this court can come to a clear conclusion that the learned trial judge was plainly wrong. The learned DPP has failed to satisfy this court that the learned trial judge was plainly wrong and that his decision should have been the other way. We are also of the view that even if the learned trial judge had accepted the evidence of SP10 and SP11 and hold that the respondent was the last person to be seen with the deceased, we do no not think that would have led to the irresistible inference that it was the respondent who murdered the deceased.

[47] Generally we would agree with the submission of the learned DPP that the fact that there are discrepancies in a witness testimony does not straight away make him an unreliable witness and make the whole of his evidence unacceptable (see *Mohd Alias v Public Prosecutor* [1983] 2 MLJ 172). But then the learned trial judge, from our reading, had carefully weighed the evidence in arriving at the decision that he made, viz that SP10 and SP11 were not truthful witnesses. As such, we see no reason why we should disturb his finding on credibility of these witnesses.

[48] In relation to scientific evidence adduced at the trial, the learned DPP contended that the learned trial judge did not give adequate consideration to the following:

(i) that the cause of death was asphyxia and it was caused by the 2 crumpled towels (exhs P16A and P16B) being forced into the deceased's mouth and that exh P16A bore the DNA profiles of the respondent and the deceased;

(ii) the tissue papers were wet when they were recovered from the waste paper basket and seminal stains from the tissue papers bore the DNA profile of the respondent which in turn would denote that he was recently engaged in sexual intercourse with the deceased;

(iii) bruises detected on both thighs of the deceased were caused by hard and heavy pressure by another person who was big in size pressing against the deceased; in relation to this he pointed out that the respondent's built as described by SP15 could by inference denote that he could have caused those bruises, namely, his weight was 100kg and his height was 191cm;

(iv) the deceased died after sexual intercourse had taken place and the evidence indicated that the respondent was the last person to have sex with the deceased and hence was responsible for the death of the deceased.

[49] The learned DPP then pointed out that in relation to the scientific evidence the learned trial judge had this to say in his grounds of judgment:

> Alas, these evidence too fell short of the standard needed even at establishing a prima facie case. In fact those scientific evidence, especially the existence of the 'Unknown Male 1' being seemingly the last person to have been with the deceased, were laden with doubts, besides the inferences this court had found to be favourable to the accused.

[50] He argued that the learned trial judge should consider all the evidence as a whole. In relation to presence of the DNA of the unknown male on the various exhs discussed earlier, the learned DPP submitted even with the presence of that DNA, the court 'should look at the evidence and properly weigh them'.

[51] From our reading of the grounds of decision, we are of the view that the learned trial judge meticulously looked at and gave due consideration to all the evidence adduced and correctly weighed them before arriving at the decision that he made. What is clear from the scientific evidence introduced at the trial is that there was the presence of the DNA profile of the unknown male. Based upon what was adduced before the court, the learned trial judge found, inter alia, that:

(i) the respondent and the unknown male had sexual intercourse with the deceased within 72 hours of her death;

(ii) the unknown male had anal intercourse with the deceased;

(iii) the deceased died after the act of sexual intercourse.

[52] In his evidence, SP13, the doctor who conducted the post-mortem stated, under cross-examination, that after examining the deceased's body he was of the view

that the death was consistent with asphyxia. He also stated that he cannot say with certainty that death was due to strangulation, gagging or choking. He further stated that the tongue can also fall back and block the airway if a piece of towel, similar to exh P16A and B, is rolled into a ball and pushed into the mouth. With regards to the deceased, he stated that he did not know what caused the death. SP13 stated that there was no sign of any struggle found on the body of the deceased and that he was of the opinion that the deceased died after having sexual intercourse.

[53] The evidence also showed that the electrical cord and the brassiere which were used to tie up the deceased contained the DNA profile of the deceased and the unknown male. Strands of hair recovered from the deceased's bedsheet and comforter matched the DNA profile of the unknown male. The fingernail clippings of the deceased also revealed the presence of the DNA profile of the unknown male as well as the respondent. Further, the piece of towel that dropped out of the deceased's mouth contained the DNA profile of the unknown male as well as the deceased and the respondent.

[54] The evidence clearly showed that the respondent and the unknown male had sexual intercourse with the deceased within 72 hours prior to her death but then, the respondent is not charged with an offence in relation to the act of sexual intercourse but with murder and the prosecution thus would have to show that the death of the deceased has been caused by or in consequence of the act of the respondent and that such act was done with the intention either of causing death or of causing bodily injury sufficient in the ordinary course of nature to cause death.

[55] The evidence also showed that the respondent surrendered to the police three days after the date of the incident. He was later examined by Dr Mohd Shah bin Mahmood (SP15) from the Forensic Department, Kuala Lumpur Hospital who testified that he saw no injury marks on the respondent except for a scratch mark 1.5cm in length behind his right shoulder which he opined was about two or three days old. SP15 was also of the view that the respondent had shaved his pubic hair about two days prior to his examination.

[56] The chemist SP14, based upon the DNA results obtained from the mixed semen stain from the cotton swab (exh P 25) and the crumpled tissue papers found in the waste paper basket could not say for sure that the respondent was the last person to have sex with the deceased.

[57] Based upon the above, we are of the view that the learned trial judge was correct in concluding that the prosecution had not proven that the respondent was the last person to have had sexual intercourse with the deceased

[58] The existence of the DNA profile of the unknown male on the various materials and exhibits recovered from the said apartment coupled with the evidence of SP28 and to a certain extent SP12 showed that the presence of another person was not a figment of imagination. In his evidence, SP12 said when he returned to the said apartment with SP28 on the day of the incident he detected an unpleasant strong body odour smell at the entrance area but there were no shoes on the shoe rack.

He then locked the main door of the said apartment. Whilst he was unlocking his bedroom door, SP28 informed him that she saw someone coming out of the deceased's bedroom. In her evidence, SP28 stated that she noticed the strong body odour smell when she entered the said apartment. She then noticed the silhouette of a person on her right but ignored it and then went towards her bedroom. Later, she discovered that the main door to the said apartment was unlocked whilst she was sure that SP12 had locked it and from the said apartment she saw a male person walking towards the guardhouse whilst putting on his shirt. She was of the view that he was the same person whom she had a fleeting glance of when she was walking towards her bedroom. She shouted to the security guard at the guardhouse to stop the person but there was no response and neither did she see any security guard. She described the person as being dark-skinned and who looked like an Indian although she could not be certain.

[59] SP28 testified that she was familiar with the respondent and would be able to identify him. Prior to the deceased's death, she had met the respondent at the said apartment and also at places known as the Crystal Club, Crossroad Bar, Concorde Hotel and Nouva Disco. She further said that the respondent was a regular visitor to the said apartment and that the deceased had also informed her that he sometimes spent the night with her. She had also noticed his shoes in the said apartment and had seen his motorcar parked in front of the condominium. She described the respondent as being a tall person and not very dark-skinned. SP28 said that it was her first experience that early morning on the day of the incident that she noticed the body odour smell upon entering the said apartment.

[60] In his evidence, SP12 said the the respondent was 'a smart and well-groomed person'. On 3 December 2003, the respondent gave him a lift to Concorde Hotel in an air-conditioned car and whilst therein, he did not notice any body odour or unpleasant smell. He also said that it was his first experience that early morning on the day of the incident that he noticed the bad body odour smell upon entering the said apartment. He described the respondent as having an imposing figure, height and built and is a person who was 'easy to spot'.

[61] Looking at the facts of this case, the case of *R v Abbot* [1955] 2 All ER 899 came to the forefront of our minds. In that case, Lord Goddard CJ in delivering the judgment of the Court of Appeal of England said (at p 901):

> ... If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case. If, in those circumstances, it were left to the defendants to get out of it if they could, that would put the onus on the defendants to prove themselves not guilty. Finemore J, remembers a case in which two sisters were indicted for murder, and there was evidence that they had both been in the room at the time the murder of the boy committed; but the prosecution could not show that sister A had committed the offence or that sister B had committed the offence. Very likely one or the other must have committed it, but there was no evidence which, and although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and that the law should be maintained that the prosecution should prove the case...

[62] We are aware that in the instant case, only the respondent is facing the charge of murder unlike the facts as found in *R v Abbot* but then, the evidence strongly showed that an unknown person was present in the said apartment on the morning of the incident just before the body of the deceased was discovered. The evidence of SP28 clearly points to this fact.

[63] The facts of this instant appeal also brought to the forefront of our minds the case of *Public Prosecutor v Muhamad Nasir bin Sharuddin & Anor* [1994] 2 MLJ 576. In that case, the first and second accuseds, who were husband and wife, lived with their children in a house which was raided by the police. The police found 3,455.51g of cannabis in various parts of the house and arrested the first and second accused and a third person named Ismail Katan who was also in the house. The first and second accuseds were jointly charged with trafficking in dangerous drugs under s 39B of the Dangerous Drugs Act 1952 while Ismail Katan became a prosecution witness. There was evidence that Ismail Katan had occasionally spent the night at the house. At the close of the case for the prosecution, the learned trial judge, Visu Sinnadurai J found the prosecution had failed to make out a prima facie case against the second accused and she was accordingly acquitted and discharged. As against the first accused, he found that the prosecution had succeeded in making out a prima facie case against him and ordered him to enter on his defence. The first accused gave evidence on oath and his defence was that none of the drugs found in the house belonged to him. He stated that all the drugs belonged to Ismail Katan. At the close of the defence case, the first accused was acquitted and discharged. In his grounds of judgment, Visu Sinnadurai J referred to, inter alia, *R v Abbot* and the observation of Lord Goddard quoted above. He said (at pp 597–598):

> The presence of a third party in the house, Ismail Katan, raises some doubt as to whether it could be said conclusively that all the drugs found in the house were in the possession of the first accused.
>
> Where two or more persons are found in a place where an alleged offence is said to have been committed, and if the evidence as to the commission of the offence does not clearly point to one or to the other, it is said that the guilt of neither has been established.

[64] Visu Sinnadurai J then said the above observation of Lord Goddard CJ has been approved and applied by our Supreme Court in *Choo Chang Teik & Anor v Public Prosecutor* [1991] 3 MLJ 423 and also in *Shamsuddin bin Hassan & Anor v Public Prosecutor* [1991] 3 MLJ 314. He further said:

> Though the above observations of Lord Goddard CJ and the application of them by the Supreme Court has been in cases where both the persons had been charged and tried, the same principles are equally applicable in a case like the present, were (sic) only the first accused is being charged without the other party: see the decision of Mahadev Shankar J in *PP v Aris*. The principles applicable in both the situations are the same: if it is not clearly established whether A or B committed the offence, irrespective of the fact that only A is being charged, then A cannot be found guilty if the evidence does not conclusively indicate his guilt. In fact, this principle applies with greater force in cases dealing with possession. If it cannot be established whether A or B had possession of the offending item, neither A nor B can be found guilty, unless of course, A and B had been jointly charged with a common intention, and if common intention can be established.

In *Shamsuddin v Public Prosecutor*, where a husband and wife were jointly charged for possession (and trafficking) of drugs found in a parcel thrown out of a car occupied by the accused, Harun Hashim SCJ in acquitting both of them observed at p 497, 'at best the evidence showed that one of the appellants must have had custody and control of the drugs to throw it out of the car. But, who?

His Lordship held that in the absence of evidence as to who exactly threw the parcel out of the car, neither of the accused could be found guilty. He further added at p 498, 'It would have been different if only one of the appellants was in the car at the material time or one of them was actually seen throwing the bundle out of the car.

[65] In the instant appeal, it is clear that the respondent was acquainted with the deceased and had on occasions visited her at the said apartment. He had sexual intercourse with her within 72 hours prior to her death. The unknown male also had sexual intercourse with her within 72 hours prior to her death. The post-mortem carried out on the deceased showed that she died of asphyxia.

[66] We reminded ourselves that an appeal is merely a continuation of the trial, and throws open all the evidence to re-examination in order to determine whether or not the various findings of the trial court are correct (see *Tan Boon Teck v Public Prosecutor* [1950] MLJ 44). The learned DPP argued that the prosecution had adduced sufficient circumstantial evidence to raise a prima facie case against the respondent. We disagree. Having reviewed all the evidence in this appeal and having formed an opinion of its weight and reliability similar to that of the learned trial judge, we would conclude that he was right in acquitting the respondent on the charge of the offence of murder at the close of the case for the prosecution. It could not be said that at the close of prosecution evidence, the prosecution had established a prima facie case, which if unrebutted would warrant a conviction, and therefore we conclude that the respondent was rightly acquitted and dicharged. On the whole, in the particular circumstances of this case, we find that the learned trial judge was justified in acquitting the respondent without calling upon him to enter on his defence.

[67] Where the evidence is wholly circumstantial, what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope (see *Chun Chwen Kong v Public Prosecutor* [1962] MLJ 307). There is insufficient evidence to connect the respondent with the killing. Circumstantial evidence should be such that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person you will find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps, then it is of no use at all (see *Idris v Public Prosecutor* [1960] MLJ 96).

[68] In this case, the circumstantial evidence does not point conclusively that the death of the deceased had been caused by or in consequence of the act of the respondent and that such act was done with the intention of either causing death or of causing bodily injury sufficient in the ordinary course of nature to have caused her

death. There is a possibility that the deceased might have died from violence from a source other than the respondent. With regards to this, we also noted that the Indian male that PW28 saw and the unknown male that had recent sexual intercourse with the deceased may be two different persons. Thus the evidence as to the commission of the offence of murder does not clearly point to the respondent, the unknown male or the Indian man mentioned by PW28 if indeed they were two different persons.

[69] Having reviewed the prosecution's case, we find there is insufficient evidence to point conclusively that the death of the deceased was caused by or was a consequence of the act of the respondent and that such act was done with the intention of causing death or of causing bodily injury sufficient in the ordinary course of nature to have caused her death. We thus find that the learned trial judge was correct in acquitting the respondent at the close of the prosecution's case without calling for his defence when the prosecution failed to establish a prima facie case which, if unrebutted would warrant a conviction. The presence of the unknown person, as reflected in the evidence adduced, clearly cast a doubt in our mind that the respondent was the one who caused the death of the deceased. We would agree with the learned trial judge that no prima facie has been made and hence the respondent was entitled to an acquittal.

[70] Accordingly, we dismissed this appeal and affirmed the decision of the learned trial judge.

Enclosure 10a

[71] We would now give our reasons for dismissing enclosure 10a, ie, the application by the Public Prosecutor to move this court for the following orders:

(a) that this court exercise its powers under s 60 of the CJA and direct/order the learned trial judge to write a 'supplementary judgment' in relation to the contents of paragraph 5 of the affidavit of one Stanley Clement Augustin sworn on 27 November 2004 and the contents of paragraph 4 of the affidavit of one Murni bte Wan Omar, a *Harian Metro* newspaper reporter sworn on 27 November 2004;

(b) that the applicant be given leave to file a supplementary petition of appeal within 10 days of receipt of the said 'supplementary judgment';

(c) or, if required, that leave be given to the applicant to call the said Stanley Clement Augustin and Murni bte Wan Omar as witnesses for the applicant to testify on that part of the contents of the oral judgment delivered by the learned trial judge which have been omitted from his written grounds of decision.

Section 60(1) of the CJA reads:

(1) At the hearing of an appeal the Court of Appeal shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or his advocate, if he appears, and may hear the appellant or his advocate in reply, and the Court of Appeal may thereupon confirm, reverse or vary the decision of the High Court, or may order a retrial or may remit the matter with the opinion of the Court of Appeal thereon to the trial court, or

may make such other order in the matter as to it may seem just, and may by that order exercise any power which the trial court might have exercised:

Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

[72] In his affidavit which is annexed to the application, the said Stanley Clement Augustin who was the prosecuting officer in this case in the court below stated in para 5 of his affidavit as follows:

Para 5:

Saya ingin menyatakan dengan hormatnya semasa Yang Arif Hakim bicara memberikan keputusan lisan dengan membaca dari catatan bertulis beliau pada 1 Julai 2004, Yang Arif Hakim bicara diantara lain ada menyatakan perkataan-perkataan berikut:

Profil DNA si mati, tertuduh dan seorang perempuan yang tidak dikenali ditemui pada satu tuala yang disumbat di dalam mulut si mati manakala hanya profil DNA si mati ditemui pada satu lagi kain tuala. Pendakwaan berhujah bahawa tertuduhlah yang melemaskan si mati dengan tuala muka kecil yang ditemui di dalam mulut Noritta sebab dialah orang yang terakhir melakukan seks. Saya tidak boleh terima hujah ini. Keterangan saksi menunjukkan yang tuala ini terkeluar sendiri daripada mulut si mati apabila badan dialihkan. Keterangan saintifik mengatakan jika tuala sebegini disumbat ke dalam mulut sehingga menyekat saluran pernafasan, tidak mungkin tuala ini akan keluar dengan senang. *Penemuan profil DNA tertuduh pada tuala itu tidak menghairankan kerana ia pernah digunakan tertuduh yanq sering ke situ dan berada di bilik Noritta.*

Profil DNA tertuduh yang ditemui pada lapan helai tisu menunjukkan ada kesan air mani tertuduh, ahli kimia yang membuat ujian ringkas memberitahu mahkamah bahawa tiga titik air mani yang dititiskan atas tisu akan kering selepas satu jam. *Tertuduh dikatakan berada bersama si mati sehari sebelum kejadian iaitu dari 3 pagi hingga 4 pagi. Tetapi tiada eksperimen dibuat pada tisu yanq dijumpai sama ada ia akan kekal basah. Tidak ada bukti bahawa gumpalan itu akan kekal basah walaupun selepas 25 jam.*

Keputusan lisan dari catatan bertulis Yang Arif Hakim bicara dan pengataan-pengataan beliau telah dilaporkan oleh akbar *Harian Metro* bertarikh 2 Julai 2004 di mukasurat 5, perenggan 2 hingga 4 akhbar *Harian Metro* tersebut.

Sesalinan akhbar tersebut masing-masing saya lampirkan sebagai eksh 'SCA-1'.

[73] Translated into the English language, the said paragraph 5 above would read as follows

Para 5:

With respect, I wish to state that in delivering his oral judgment whilst reading from a written text on 1 July 2004, the trial judge, among others, did say the following words:

The DNA profiles of the deceased, the accused and one unknown female were found on a towel which was stuffed in the deceased's mouth whereas only the DNA profile of the

deceased was found on the other towel. The prosecution submitted that it was the accused who choked the deceased with the small face towel that was found in Noritta's mouth because he was the last person to have sex. I cannot accept this submission. Witness evidence shows that the towel came out by itself from the deceased's mouth when her body was moved. Scientific evidence showed that if a towel similar to such towel is stuffed into the mouth until it blocks the respiratory channel, it is unlikely that the towel can come out with ease. *The discovery of the DNA profile of the accused on that towel is not surprising as it has been used by the accused who was regularly there and was in Noritta's room.*

The DNA profile of the accused found on eight pieces of tissue paper showed traces of the accused's semen, the chemist who conducted an ad hoc test told the court that three drops of semen if dropped on tissue paper will dry up after an hour. *It is said that the accused was with the deceased a day before the incident that is from 3 am to 4 am. But no experiment was carried out on the tissue paper found as to whether it will continue to remain wet. There is no evidence that that lump will remain wet even after 25 hours.*

The oral decision from the written notes of the trial judge and his comments have been reported by *Harian Metro* dated 2 July 2004 at p 5, paragraphs 2 to 4 of the said *Harian Metro*.

[74] The contents of para 4 of the affidavit of the said Murni bte Wan Omar are identical to para 5 of the affidavit of the said Stanley Clement Augustin.

[75] In canvassing this application, the learned DPP argued that the learned trial judge omitted to include certain relevant findings in his written grounds of decision and he then referred to the underlined sentences in para 5 of the affidavit of the said Stanley Clement Augustin, reproduced above and para 4 of the affidavit of the said Murni bte Wan Omar. As such, he wanted this court to direct the learned trial judge to write a supplementary judgment with regards to what have been reflected in the underlined sentences as his written grounds of decision contained in the appeal record made no mention of such findings. These findings can be illustrated as follows:

(i) that it is not surprising that the DNA profile of the respondent was found on exh P16A, ie, the piece of face towel which was crumpled into a ball and which fell out from the deceased's mouth when SP12 untied the bolster case tied around the deceased's face as that piece of face towel had been used by the respondent who was a regular visitor to the deceased's room;

(ii) it has been said that the respondent was together with the deceased a day before the incident (which, to us, would mean 4 December 2003) from 3 am to 4 am but no experiment was carried out (which, to us, would denote by SP14, the chemist) on the tissue paper (which, to us, would mean the 11 pieces of tissue paper marked as exhs P29 'a' to 'k' and out of which 8 pieces were found to bear seminal stains with spermatozoa) as to whether it would continue to remain wet; there is no evidence that the tissue paper will continue to remain wet even after 25 hours.

[76] In relation to this, the learned DPP's written submission reads, inter alia, as follows:

(4) We humbly submit that the first underlined sentence clearly indicates that the learned trial judge had came to a finding that the said towel namely P16A which bore the DNA profile of the respondent had been used by the respondent who regularly visited the deceased ('pernah digunakan tertuduh yang sering ke situ dan berada di bilik Noritta'). We submit that there is no evidence to support this finding and therefore it is a clear misdirection. We did lead evidence that the respondent was indeed a regular visitor but certainly no evidence to suggest that the respondent had used that particular towel before this incident and that there was no evidence to suggest that the towel was already there prior to the incident. We adduced evidence to prove that that particular towel together with another towel were used to choke the deceased which subsequently caused her death and that towel P16A bore the DNA profile of the respondent. The learned trial judge has made this finding without any supporting evidence to dismiss an important and relevant evidence adduced by the prosecution to prove the involvement of the respondent in the murder. Thus we submit such finding was erroneous and a misdirection.

(5) Unfortunately the learned trial judge in his grounds of judgment dated 12 August 2004 did not contain this erroneous finding and hence depriving us from challenging this finding.

(6) In the underlined sentences in the second passage the learned trial judge made another finding. The finding that the respondent was with the deceased a day before the incident from 3 to 4 am (4 December 2003) and by making reference to the lack of experiment done whether the wet tissue papers would remain wet after 25 hours clearly reflects that the learned trial judge has accepted the defence of alibi as contained in the respondent's cautioned statement put in through the Investigation Officer without the respondent having to bring the evidence in, in accordance with the law relating to alibi. This again we submit is a clear misdirection that the defence of alibi being an evidential burden, respondent must adduce evidence to introduce his alibi. Particularly so in this case the tissue papers were wet indicating recent event bearing semen stains with spermatozoa and the respondent and the deceased's DNA was found.

Section 103 Illustration (b) Evidence Act 1950 imposes a burden on the respondent to prove he was not there at the time in question. Hence he has to introduce such evidence. It is not a legal but only an evidential burden.

In connection to this, it can be inferred that the learned trial judge also made a finding in that he rejected the evidence in particular of the chemist SP14 that the finding of mixed DNA profile of the respondent and the deceased on the wet tissue papers was consistent with the fact that sexual intercourse had taken place.

It is submitted that such finding was also erroneous as the court cannot treat a self-serving statement as the truth at the prosecution's stage where an alibi is raised: *R v Storey and Anwar* [1968] 52 Cr App R 334 (T10).

(7) This again we submit deprive us from challenging the said finding as it is no where to be found in the grounds of judgment dated 12 August 2004.

(8) The importance of these findings will be real when we look at the grounds of judgment dated 12 August 2004 where the learned trial judge rejected all evidence pertaining to proving the presence of the respondent at the scene that morning of 5 December 2003. And clearly such findings in the passages formed as basis and influenced his mind in acquitting the respondent.

[77] In canvassing the application, the learned DPP referred to *Pendakwa Raya v Rungit Singh a/l Jaswant Singh* (Mahkamah Rayuan Rayuan Jenayah No P–05–60–98, unreported) wherein this court had, on an application made under s 60(1) of the CJA, ordered the trial judge, Abdull Hamid Embong J to write a supplementary judgment based upon a similar ground, namely, that certain parts of his oral judgment that he delivered in open court have been omitted from his written grounds of decision found in the appeal record. In that case, the accused was charged with three offences under s 354 of the Code, viz, use of criminal force to a person with intent to outrage modesty. In relation to the first and second charges he was also charged with alternative charges under s 377D of the Code, viz, committing an act of gross indecency with another person.

[78] The facts of that case showed that the accused was a session court judge and the complainant, a magistrate (SP1). Administratively, the accused was the head of department and the complainant was his subordinate. It was the prosecution's case that in relation to the first alternative charge under s 377D of the Code, the act of gross indecency committed by the accused was that he performed oral sex on the complainant in a motorcar whilst it was being driven by the latter. Under the second alternative charge under s 377D of the Code, the act of gross indecency committed by the accused was that he performed oral sex on the complainant in his (the accused) house. Both acts of gross indecency were said to have occurred on the same day, namely, 30 December 1997.

[79] At the close of the case for the prosecution, the learned trial judge called on the accused to enter on his defence on the two alternative charges under s 377D of the Code and on the third charge under section 354 of the Code. In his defence the accused denied that such acts took place on the said day. He claimed that the complainant was angry with him due to work related problems, namely, that the complainant had several outstanding unwritten grounds of decision. At the end of the day, the learned trial judge acquitted the accused on all three charges. He delivered his oral judgment on 5 September 1998.

[80] In relation to the application of the Public Prosecutor in *Rungit Singh* under section 60(1) of the CJA, para 5 of the affidavit in support of the application reads:

(5) Saya ingin menyatakan dengan hormatnya semasa Yang Arif Hakim bicara memberikan keputusan lisan beliau pada 5 September 1998, Yang Arif Hakim bicara di antara lain ada menyatakan perkataan-perkataan berikut; *'Adalah sesuatu perkara yang amat menakjubkan kerana saya sendiri telah membuat eksperimen dalam keadaan duduk secara biasa di dalam kereta saya bagi membuka zip dan melondehkan seluar seperti yang dikatakan oleh saksi (SP1) tetapi gagal'.* Keputusan lisan dan pengataan- pengataan Yang Arif Hakim itu telah dilaporkan oleh akhbar Mingguan Malaysia bertarikh 6 September 1998

dan akhbar *New Sunday Times* bertarikh 6 September 1998. Salinan laporan akhbar tersebut masing-masing saya lampirkan sebagai eksibit bertanda 'YMS-1' dan 'YMS-2'.

[81] The words in bold appearing in para 5 above in the English language would read:

There is a matter which is astounding because I myself had carried out an experiment whilst sitting in a normal position in my motorcar to undo my zip and to pull down my trousers as stated by the witness (SP1) but was unsuccessful.

[82] Thus, it would seem from the above that in his oral judgment, the learned trial judge acquitted the accused on the ground that as far as the first alternative charge is concerned that it was impossible for the accused to commit the act of gross indecency in a motorcar as described by the complainant and his finding was based on an experiment that the learned trial judge conducted on himself in his own motorcar.

[83] This court had on 14 December 1998 granted the order prayed for by the Public Prosecutor in *Rungit Singh*. Thus, the learned trial judge was ordered to write a supplementary judgment as his written grounds of decision as found in the appeal record did not reflect what he had said above, viz, in relation to the experiment that he carried out in his motorcar as described by the complainant. Consequently, in his supplementary grounds of judgment the learned trial judge clarified, inter alia, that the experiment that he conducted was more in relation to the first and second charges under s 354 of the Code as opposed to the alternative charges. As for the first charge under s 354 of the Code, viz, the use of criminal force by the accused upon the complainant with intent to outrage his modesty which according to the prosecution took place in the complainant's motorcar whilst the latter was driving, the learned trial judge explained that that charge cannot be sustained as he was of the view that if the complainant had actually resisted the accused's advances as he had claimed, it would not be possible for the accused to unzip the complainant's trousers and pull it down.

[84] He also clarified that he did not illustrate this experiment of his in his written grounds of decision as that experiment was carried out 'merely to satisfy myself on a proven fact'. This was how the learned trial judge put it in his supplementary grounds of decision:

Dalam membuat keputusan tersebut, saya telah tidak merujuk kepada eksperimen yang telah saya lakukan Itu. Eksperimen tersebut telah saya lakukan hanya untuk memuaskan diri saya (merely to satisfy myself on a proven fact) sama ada apa yang dikatakan oleh SP1 itu boleh dilakukan tanpa kerelaannya. Sebenarnya, keputusan ke atas isu ini telah dicapai tanpa dipengaruhi oleh eksperimen tersebut. Dalam kata lain, keputusan saya tidak bergantung kepada, dan tidak didorong oleh, eksperimen yang telah saya lakukan ke atas diri saya. Saya sedar bahawa eksperimen itu adalah satu perihal ekstrinsik yang tidak muncul daripada keterangan dan tidak boleh dijadikan asas bagi Mahkamah membuat keputusan. Undang-undang yang mapan tidak membenarkan Mahkamah mengambilkira dan mempertimbangkan unsur luar yang tidak muncul daripada keterangan dalam membuat

keputusan (melainkan faktor itu yang boleh dipertimbangkan sebagai 'judicial notice' di bawah ss 56 dan 57 Akta Keterangan 1950). Eksperimen itu, saya ulangi, hanyalah satu faktor yang digunakan untuk penilaian saya terhadap keterangan SP1, yang mana keterangan itu, secara tersendiri, telah tidak diterima oleh Mahkamah sebagai benar. Oleh itu, saya telah memutuskan bahawa keterangan SP1 sendiri atas kejadian ini amat tidak menyakinkan dan kejadian itu mustahil boleh berlaku dalam keadaan yang dikatakan oleh SP1.

[85] The case of *Rungit Singh* would seem to show that this court has the power under s 60(1) of the CJA to make such an order, namely, to order a trial judge to write a supplementary judgment. Be that as it may, we are of the view that such power, which is discretionary, should be sparingly exercised and that would depend on the circumstances of the case and the nature of the omissions in the written grounds of judgment as opposed to what was said in the oral decision pronounced in open court. In the instant appeal, the learned trial judge delivered his oral decision in open court on 1 July 2004. Page 472 of the appeal record in relation to this, viz, the minutes of the proceedings of the learned trial judge read as follows:

Keputusan

DALAM MAHKAMAH TERBUKA 01 JULAI 2004

46-54-2003

TPR Encik Stanley Augustin dibantu oleh Puan Roszianayati Ahmad dan Puan Nahra bte Dollah bagi pihak PR.

PB Encik V Sithambaram dibantu oleh Encik Mohd. Haaziq Pillay, Encik Rajivan Nambiar dan Encik Robert Devan bagi pihak OKT

OKT hadir

Keputusan kes prima facie.

Mahkamah:

Tiada kes prima facie.

OKT dilepas dan dibebaskan.

Ekshibit kepada pihak pendakwaan untuk dilupuskan selepas tamat tempoh rayuan.

tt: Dato' Abdull Hamid bin Embong.

[86] Thus, on 1 July 2004, the learned trial judge delivered his oral judgment by reading from a written text. In fact, according to para 5 of the affidavit of Murni bte Wan Omar, the newspaper reporter from *Harian Metro*, she was later given

permission on the same day to read that written text and to copy it. What she copied was reproduced in the following day's edition of *Harian Metro*, specifically the excerpt that is now reflected in para 4 of her affidavit.

[87] A copy of that oral judgment read out by the learned trial judge on 1 July 2004 does not appear in the appeal record before us. The Public Prosecutor filed his notice of appeal on 2 July 2004. The appeal record shows that the learned trial judge's grounds of judgment was dated 12 August 2004 and this is the only written grounds of decision before this court that forms part of the appeal record.

[88] We had carefully perused the application by the Public Prosecutor and also the material before us at the outset of the hearing of this appeal and, as mentioned earlier, we had dismissed the application. We are of the view that under the circumstances of this appeal it would be wrong in principle to require the learned trial judge to supplement his written grounds of decision dated 12 August 2004. We based this view on several reasons.

Section 52 of the CJA reads:

(1) When a notice of appeal has been filed the Judge by whom the decision was given shall, if he has not already written his judgment, record in writing the grounds of his decision, *and the written judgment or grounds of decision shall form part of the record of the proceedings.*

(2) ...

(Emphasis added.)

Section 307(3) of the Criminal Procedure Code (CPC) reads:

When a notice of appeal has been lodged the Court appealed from shall make a signed copy of the grounds of decision in the case and cause it to be served upon the appellant or his advocate by leaving the said copy at the address mentioned in the notice of appeal or by posting it by registered post addressed to the appellant at the said address.

(Emphasis added.)

[89] Thus, only a written and signed copy of the judge's grounds of decision shall form part of the record of the proceedings. In the instant appeal the learned trial judge's written and signed copy of his grounds of decision appearing in the appeal record is dated 12 August 2004. That was the grounds of decision that were served on the Public Prosecutor and the respondent.

[90] In *Nathan v Public Prosecutor* [1972] 2 MLJ 101, the appellant alleged in his petition of petition of appeal, amongst other things, a miscarriage of justice in that the learned president of the sessions court had delivered three sets of grounds of decision for the purpose. In dealing with this issue, Ong Hock Sim FJ said (at p 102):

I would only refer to s 302 subsection (3) of the Criminal Procedure Code which reads:

> When a notice of appeal has been lodged the court appealed from shall make a signed copy of the grounds of decision in the case and cause the same to be served upon the appellant or his advocate.

In view of that, the only judgment for the consideration of the court is the second or the signed copy of the grounds of judgment, with the offending words which were not uttered in open court on 10 January 1972, the so-called first set of grounds of decision. Regarding the subsequent purported deletions made in the 'third set' of grounds of decision, it is, in my opinion, not competent for the court to supplement the signed grounds of decision (see *Loh Kwang Seang v Public Prosecutor* [1960] MLJ 271) or, as a necessary corollary, to make deletions therefrom.

[91] Although the circumstances in *Nathan v Public Prosecutor* are quite different from the instant appeal, the fundamental principle is the same. We are of the view that the only judgment before us for our consideration is the signed copy of the grounds of decision dated 12 August 2004 as found in pp 473–534 of the appeal record and it would not be competent for this court, under the circumstances of this instant appeal, to order the learned trial judge to supplement that grounds of decision. Furthermore, we are of the view that the findings of the learned trial judge which are in issue, as highlighted by the Public Prosecutor, did not have any bearing at all on the decision made by him at the end of the day. In other words, even if these findings were mentioned in the written grounds of decision of the learned trial judge, any challenge embarked upon by the DPP would not have vitiated the end result of this instant appeal.

[92] The scientific evidence clearly showed that the DNA profile of the respondent was found on the towel (exh P16A). It can be inferred that since the respondent was a regular visitor to the deceased's room, the discovery of his DNA profile on the towel is not surprising as he may have used it or had come into contact with it otherwise it would not bear his DNA profile. In relation to this, the learned DPP contended there is no evidence to support the learned trial judge's finding and therefore 'it is a clear misdirection'.

[93] We cannot comprehend this contention. We would have thought that this finding was clearly in the prosecution's favour. Similarly, we cannot fathom how the issue raised on the tissue papers being wet with seminal stains and as to whether it will remain wet after 25 hours can be tied up with the argument proffered by the learned DPP that 'the learned trial judge has accepted the defence of alibi as contained in the respondent's cautioned statement put in through the Investigation Officer without the respondent having to bring the evidence in'. Section 402A of the CPC provides as follows:

> (1) Where in any criminal trial the accused seeks to put forward a defence of alibi, evidence in support of it shall not be admitted unless the accused shall have given notice in writing of it to the Public Prosecutor at least ten days before the commencement of the trial.

(2) The notice required by subsection (1) shall include particulars of the place where the accused claims to have been at the time of the commission of the offence with which he is charged, together with the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi.

[94] We are not aware as to whether the respondent had given a notice in writing in relation to a defence of alibi to the Public Prosecutor. The transcript of the proceedings in the court below did not also reflect this. Further, the learned trial judge did not deal with the respondent's cautioned statement in his written grounds of decision.

[95] From our reading of the application and in comparing the written grounds of decision of the learned trial judge, we are of the view that the points raised by the learned DPP in relation to the issues canvassed in the application would not have vitiated the appeal and hence a supplementary judgment is clearly out of the question. Based on s 52 of the CJA and read together with s 307(3) of the CPC, we are of the view that only a written and signed copy of the learned trial judge's grounds of decision, which forms part of the record of the proceedings, is to be considered by this court in this instant appeal.

[96] The above are the reasons why this application, ie encl 10a was dismissed.

Appeal and appellant's application dismissed.

Reported by Loo Lai Mee